A Hague Parallel Proceedings Convention: Architecture and Features

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Abstract

The Hague Conference on Private International Law has established a working group to examine a possible international instrument applicable to the same or related actions in courts in different countries. The goal of the project should be to improve the efficiency of resolving such situations and providing as complete a resolution as possible by channeling litigation to the "better forum." Current approaches—lis alibi pendens *in the civil law world and* forum non conveniens *in the common law world—are not working well and are likely to be increasingly inadequate in an ever more complex and fluid world. In this Article we provide suggestions on the architecture and certain critical features of a convention in this area. The general architecture of such an instrument must include (1) criteria for determining the "better forum" and (2) mechanisms that move cases to that forum. It should also include (1) a requirement that the parties notify the relevant courts when the same or related proceedings are lodged in two or more fora; (2) a mechanism for judicial communication to discuss the situation upon notification; (3) a fallback rule if the better forum declines jurisdiction; (4) necessary and appropriate procedural provisions, for example to expedite movement of evidence to the better forum; and (5) provisions addressing expedited recognition and enforcement of the judgment from the better forum. Because the ultimate users of any instrument will be judges and litigators, the instrument should be framed in terms they will understand. Accordingly, the instrument should rest upon relatively simple, empirical tests that courts around the world can apply easily, rather than on complex legal concepts drawn from one or another legal tradition. The tests, in turn, should be keyed to the fundamental objective of the instrument: the efficient resolution as completely as reasonably possible of parallel proceedings and related actions. This*

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Article illustrates how such an approach might be fashioned by suggesting empirical tests to determine two critical decision points for the instrument, substantive scope and determining the better forum.

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I. INTRODUCTION

In a previous article, *A Hague Convention on Parallel Proceedings*,[1] we argued that the Hague Conference on Private International Law should not undertake a project to require or prohibit exercise of original jurisdiction in national courts. A functioning and effective international convention that would purport to do so is unnecessary, undesirable, and unobtainable. In contrast, an instrument regulating parallel proceedings is needed now and will be needed even more in the future. It would be highly beneficial in the world of transnational litigation and may be obtainable. The goal should be to improve the concentration of parallel litigation in a "better forum" to achieve efficient and complete resolution of disputes in transnational litigation.

The Hague Conference appears to be willing to take this path and now has a Working Group considering draft text that could be passed on to a Special Commission in the preparation of such a convention.[2] However, as the Experts Group and Working Group have moved forward on the Parallel Proceedings Convention project in the Hague Conference, there has been significant difficulty in leaving behind existing approaches that have not led to acceptable solutions. These existing approaches are:

1. The traditional civil law *lis alibi pendens* approach to parallel litigation (same parties, same claims) that results in a simple and rigid focus on deference to the court first seized;
2. The traditional common law *forum non conveniens* doctrine that relies on a substantial element of judicial discretion in determining whether to move forward with a case that has been or may be brought in another court; and
3. The focus on indirect bases of jurisdiction, which has been a part of the Jurisdiction and Judgments Project from the beginning and is seen as key to the 2019 Judgments Convention Article 5(1).[3]

The focus on these approaches has prevented fresh thinking and engendered an "us versus them" atmosphere of concerted effort to hang on to

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1 Paul Herrup & Ronald A. Brand, *A Hague Convention on Parallel Proceedings*, 63 HARV. INT'L L.J. ONLINE 1 (2022), https://perma.cc/7ZX2-L3K2.

2 While the current project is catalogued under the title "Jurisdiction Project" on the Hague Conference website, the Working Group has focused on an instrument dealing with parallel proceedings, as indicated by the most recent documents included under the title. *See Jurisdiction Project*, HAGUE CONF. ON PRIVATE INT'L L. (2022), https://perma.cc/HKM4-NE3L.

3 Francisco Garcimartín & Geneviève Saumier, *Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgements in Civil or Commercial Matters*, HAGUE CONF. ON PRIVATE INT'L L. 88 (2020), https://perma.cc/QH7P-4B2A; *see also* Hague Conference on Private International Law, Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, Jul. 2, 2019, https://perma.cc/P2BY-CR87.

the familiar and champion one's own legal system. A path forward is needed that removes the focus from a contest between existing systems, none of which currently provides a satisfactory approach to the problem.

In this Article, we examine the possible architecture and some of the critical features of a parallel proceedings convention geared to moving litigation to the better forum. We hope to elicit and contribute to discussion on this subject, as part of the Hague process as well as more generally. Unfortunately, this is an area in which no national law, legal system, or family of legal systems performs well.[4] Success in reaching a good convention will require all participants to approach the project with open minds and to adopt a willingness to listen to others and make reasoned departures from old dogmas and preconceptions. There will be little virtue to a convention that simply attempts to bridge currently inadequate or even dysfunctional rules and approaches.

II. GENERAL OBSERVATIONS

The situations in which more than one country asserts jurisdiction under its own law over the same or related claims constitute an existing irritant in transnational civil litigation. As we noted in our previous discussion of the effort to find a way forward on parallel proceedings:

> The traditional solution in many common law countries is to let litigation proceed in multiple countries, with resolution of the matter (or not) coming at the stage of recognition and enforcement of the first judgment issued by the various courts considering the matter. This approach leads to a race to judgment, and may result in duplicative litigation, significant additional expense for litigants, and potential conflicting judgments. These problems may be modulated by application of the doctrine of *forum non conveniens*, which usually requires a court to balance a basket of factors and defer to proceedings in another forum only if the other forum is clearly more appropriate to resolve the dispute.
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> The traditional solution in many civil law states is to rigidly prescribe and rank order jurisdictional bases and, if nonetheless jurisdiction might subsist in multiple fora, then apply a strict *lis pendens* rule, which bars consideration of a claim or set of claims if another court was "seized" first. This approach leads to a race to the courthouse and very artificial strategic litigation, such as an anecdotally reported proliferation of requests for negative declaratory judgments (e.g., a declaration in favor of a party who expects to be sued in another forum that the party bringing the request has no legal obligations to the other persons).[5]

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4 *See, e.g.*, THOMAS E. CARBONNEAU ET AL., INTERNATIONAL LITIGATION AND ARBITRATION: CASES AND MATERIALS, 182–83 (3d ed. 2020).

5 Herrup & Brand, *supra* note 1.

As increasing global mobility brings in its train an increase in global disputes and lower barriers to entry in international markets, this problem will only grow in magnitude.

The problems created by the conflicting approaches to parallel litigation make desirable an instrument that could move parallel litigation to the "better forum" in appropriate cases or classes of cases, but only if that can be done without the complex and difficult enterprise of mandating or prohibiting pre-existing national jurisdiction rules. Such a better forum approach has the potential to enhance convenience for litigants and efficiency for dispute resolution generally, while taking into account the legitimate sovereign interests that might be implicated in each dispute.

The general architecture of such an instrument must include (1) criteria for determining the "better forum" and (2) mechanisms that move cases to that forum. It should also include (3) a requirement that the parties notify the relevant courts when the same or related proceedings are lodged in two or more fora; (4) a mechanism for judicial communication to discuss the situation upon notification; (5) a fallback rule if the better forum declines jurisdiction; (6) necessary and appropriate procedural provisions, for example to expedite movement of evidence to the better forum; and (7) provisions addressing expedited recognition and enforcement of the judgment from the better forum. Because the ultimate users of any instrument will be judges and litigators, the instrument should be framed in terms they will understand.

The general architecture described above can be put into sharper focus by examining the life course of a parallel proceeding. This life course moves from the filing of the same or related cases in more than one forum, to the decisions of each forum regarding its own jurisdiction (possibly also taking into account the proceedings in other fora), to adjudication (including gathering of evidence), to issuance of judgments and the resulting issues of recognition and enforcement.

Consideration of the life course of actual parallel proceedings allows us to identify and to build from the ground up a set of decision points that may have to be considered for inclusion in a parallel proceedings convention. These decision points include:

1. What falls within (and without) the definition of "parallel proceedings" for convention purposes?
2. What issues (subject matters) are to be excluded from scope that otherwise might fall within more general scope provisions?
3. If the Convention itself specifies gateway determinations into scope other than determinations of national courts that they have jurisdiction under their own law, what should be included on that gateway list, and

what are the consequences if one court has a factor on the list and the other does not?

4. Once within scope, what should govern the determination of the better forum?
5. What considerations might apply that may result in both courts continuing with the case?
6. Should there be other limitations, such as sovereignty issues, that would allow a court *not* to defer to a court of another jurisdiction?

In this Article, our focus will be on several keystone decision points that require extended and early consideration and will ripple throughout the Convention, namely the definition of parallel proceedings (decision point 1) and the determination of better forum (decision point 4).

III. KEYSTONE DECISION POINTS

A. Scope

The Parallel Proceedings Convention should apply when adjudication is sought in courts in more than one State of disputes that are so connected that they should be resolved in a unified fashion. Scope in this sense requires attention to four features: (1) cases, that are both (2) international and (3) multiple, in the sense that courts located in different countries each are asked to adjudicate a claim or claims, and (4) related, such that there are connections between the cases that satisfy criteria specified in the Convention.

1. International Cases

The restriction to cases and the requirement that the cases be international should be relatively straight-forward and have well-worn usage in other Hague Conventions.[6] The Convention should apply to "cases" in the sense of proceedings to resolve legal disputes in national courts. Other types of dispute resolution, such as arbitration or mediation, will have their own rules for assigning priorities to parallel proceedings, while dispute resolution in either national administrative tribunals or international tribunals pose issues of their own and usually do not fall within the scope of Hague conventions.

The cases should be "international" in the sense that they involve courts in more than one country. A more inclusive scope on this feature would allow convention rules to intrude into municipal rules for assigning cases, including rules of removal and transfer; areas into which an international instrument should not intrude.

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[6] *See, e.g.*, Hague Convention on Choice of Court Agreements art. 1(1), Jun. 30, 2005, 44 I.L.M. 1294.

2. Multiplicity

The requirement of multiplicity, in other words the basis of adjudication in each court that then qualifies the case as within scope (assuming the other features are satisfied), may be approached from two different perspectives, which aptly may be labelled "empirical" or "a priori." The empirical approach to multiplicity accepts that the cases fall within the scope of the Convention if each court has determined that it has jurisdiction under its national rules, including any relevant private international law rules. That two courts each have jurisdiction over the same or related claims is a matter of fact, is the ground upon which the Convention should rest, and allows building the Convention rules from the ground up. This approach differs from trying to construct an enumerated set of a priori connecting factors, often with a jurisdictional or quasi-jurisdictional flavor, to act as a gateway to scope.

In terms of the problems such a Convention should solve—most notably the expense and vexation of duplicative litigation across borders—the advantages of the ground up approach are significant, clear, and appealing; the disadvantages of the gateway connecting factor approach are equally significant, clear, and discouraging.

The empirical approach has two major, irrebuttable advantages that contribute to the object and purpose of the proposed Convention. First, it has the advantage of certainty. Either courts in more than one country have determined that they have jurisdiction to adjudicate a claim presented to them or they have not. With as much certainty as it is possible to find in any legal context, there is a fixed and invariant answer to the inquiry. Second, the empirical approach is simple. To find the answer, one must but ask. The inquiry involves no legal somersaults or comparative law investigation. Nor does it require multiple convention definitions of factors to be applied.

The comparison of the certainty and simplicity of the empirical approach with the complexity of the a priori approach is stark. The a priori approach will require each national court first to analyze a case before it—and the case before the other court as well, due to the need independently to verify fulfillment of the requirements of the convention—on the basis of factors listed in a gateway provision of the convention. The factors will have a content autonomous to the convention, but subject to interpretation in a wide variety of courts. They will be, at best, strange to those legal systems which do not use such factors, and dangerous because they will be misleading to courts in legal systems that employ similar terms, but which now must differentiate their local understandings from the autonomous requirements of the convention. There will be sharply diminished certainty in results, and the results will come only after potentially difficult legal analyses. Two or more different courts, all required to apply the convention factors, may well produce differing outcomes in that application,

needlessly complicating the process even before the fundamental purposes of the convention are addressed. There will be nothing simple about it.

Furthermore, a list of gateway factors in the convention will be either under-inclusive or over-inclusive—or both—especially if the list consists of jurisdictional or quasi-jurisdictional bases. The list will risk being under-inclusive because it will not be able to keep pace with relatively modern bases of jurisdiction that already exist or are likely to emerge in our rapidly changing world. Nineteenth-century ideas of jurisdiction based upon physical presence are increasingly less reflective of reality.[7] Newer jurisdictional bases will not be in the list and may easily generate multiple proceedings that are duplicative and avoidable, but not within the scope of the Convention because they do not qualify as gateway factors. These cases will be lost to resolution under the Convention.[8] On the other hand, an attempt to list every possible basis of jurisdiction or related criterion in a gateway provision will give no guidance as to where adjudication should be centered, but will simply pass all cases through the gateway, where they will have to be sorted out under different criteria at a later stage in the convention. This adds yet another area that will be fruitful for litigation and defeat the objective of reducing complexity and expense.

An additional consideration is that, by eliminating a priori gateway factors into scope, the empirical approach to scope disposes of the need to address the third decision point mentioned above, and with it the need to agree on a priori factors and to determine the resolution if one court has a factor on the list and the other does not. Ultimately, a convention burdened with too many decision points, particularly if similar factors are considered at multiple decision points, will collapse of its own weight and not draw states to it in the ratification and accession process. This argues strongly for simplicity of structure and approach to convention architecture. There will necessarily be a definition of parallel proceedings that focuses the Convention, just as there will necessarily be a list of subject matter exclusions from the scope of the Convention. But it makes no sense to have a jurisdiction-style set of connecting factors as a gateway to consideration of the better forum. If two courts in different countries have jurisdiction over a case that satisfies the criteria of relatedness for purposes of the Convention, then the question is a simple one: which is the better forum for deciding the dispute, or is there otherwise good reason for both courts to proceed in parallel? That does not require a fractured analysis of why each

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7 *See* Alex Mills, *Rethinking Jurisdiction in International Law*, 84 BRIT. Y.B. INT'L L. 187, 204 (2014) ("The issue has, however, reduced in significance because in practice, through the doctrine of *forum non conveniens*, jurisdiction based on bare presence will not generally be exercised.").

8 Emerging technologies such as block chain accentuate this concern. Many actions may no longer involve traditional concepts of "physical presence" of the actors in any place, or, conversely, "presence" may be non-physical but in a multitude of locations simultaneously, many of which will not necessarily be known to the actors at the time of the action.

national legal system determined it appropriate to take jurisdiction in the particular case. Nor does it make one state's decision on the jurisdiction question better in quality than the other. The fact remains that, no matter the basis of jurisdiction in each court, there are parallel proceedings. Thus, the problem the Convention is intended to address exists, and no discussion of jurisdiction of each court will either change or resolve that problem. Only a determination of which court is the better court to proceed will do so. That is better done through a factual determination, not a determination of who might have "better" jurisdiction. Making qualitative decisions about bases of jurisdiction is not and should not be the role of a parallel proceedings convention.

3. Relatedness

The cases that satisfy internationality and multiplicity also must have some type of relatedness to each other to fall within the Convention as parallel proceedings. As with the question of multiplicity, there are two general possible approaches to the subject of relatedness. The first approach is empirical and would look to see if the cases arise from a common set of relevant facts. The second is legal and would analyze the claims and defenses in each complaint seeking common legal characteristics, such as the same parties, the same causes of action, and the same relief sought.

Again, it is our view that the balance inclines toward an empirical approach. It is relatively simpler, involving a comparison of the facts presented, which are the source of the claims in the various cases. It also comports better with a proper objective of the Convention, to concentrate litigation in the better forum by allowing a single court to adjudicate all the claims arising from a common set of facts and to do so in a consolidated manner. In contrast, the legal approach encounters a number of significant comparative law challenges at the threshold, including finding criteria to establish the commensurability of various causes of action and forms and quanta of relief in different legal systems (which often do not compare well), challenges in assessing cases with few or no common causes of action but which are inextricably tied together, and difficulties with cases involving overlapping, multiple parties.

We look to European law to provide a useful point of departure that has worked well in a similar situation. The European Court of Human Rights (ECHR), in its double-jeopardy or *ne bis in idem* jurisprudence, has had to determine when two offenses are *in idem*—the same. This task is analogous to the task of determining when two cases are "the same" such that they constitute parallel proceedings. In *Sergey Zolotukhin v. Russia*, the ECHR adopted a fact-based standard to guide the analysis while rejecting several standards that focused on legal characteristics and that it had used previously.[9] The ECHR

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9 *See* Zolotukhin v. Russia, 2009-I Eur. Ct. H.R. 291, https://perma.cc/7WF8-9CQ9.

stated that the *ne bis in idem* bar operates when a second "offence" arises from "identical facts or facts which are substantially the same" as those from which a previous prosecution arose.[10] The ECHR concluded that "[t]he Court's inquiry should therefore focus on those facts which constitute a set of concrete factual circumstances involving the same defendant and inextricably linked together in time and space" and which provide predicate facts for the proceeding.[11] To adapt this fact-based standard to the situation of a parallel proceedings instrument, two proceedings will be "related" for purposes of the instrument if they involve (1) "identical facts or facts which are substantially the same" and which are "inextricably linked together in time and space" as predicates for the claims, and (2) parties to the proceedings whose rights or obligations are connected to each other by virtue of these facts. The successful application of this kind of standard by Europeans in the context of a demanding legal inquiry provides promise that such a fact-based standard will work effectively as a determinant of scope in a parallel proceedings instrument.

B. Finding the Better Forum

Once the existence of parallel proceedings within the meaning of the instrument is established, the Convention should provide a mechanism to concentrate proceedings in the better forum. However, it should not be the objective of the treaty to concentrate every instance of parallel proceedings in a single forum. Success should be measured by a significant decrease in parallel proceedings that have limited justification. There may well be certain classes of proceedings that are best left to continue in parallel. Also, the costs in terms of complexity and intelligibility of the instrument may rise sharply if the instrument aspires to anticipate and regulate all conceivable or possible instances of parallel proceedings. This is an international agreement, not a piece of domestic regulatory legislation that can bring to bear all the mechanisms of the modern state, including apex courts, to achieve a purely internal result.

Creating a satisfactory test or set of tests that provide criteria identifying a "better forum" will be a difficult exercise. The task calls for a common, good faith inquiry with open minds. As we have noted elsewhere, "[t]he Hague Conference has a once-in-a-generation opportunity to engage in" creative and constructive thinking about a significant problem in international and comparative law.[12] "Whether it will meet the challenge remains to be seen."[13]

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10 *Id.* ¶ 82.

11 *Id.* ¶ 84. In reaching this language, the ECHR quoted approvingly from the decisions of the Court of Justice of the European Union (then the European Court of Justice) in Case C-436/04, Leopold Henri Van Esbroeck, 2006 E.C.R. I-2351 and Case C-367/05, Norma Kraaijenbrink, 2007 E.C.R I-6619. Zolotukhin v. Russia, ¶¶ 37–38.

12 Herrup & Brand, *supra* note 1.

1. Inadequacy of Existing Approaches

As we have noted, the problem is not handled well in any legal system of which we are aware.[14] Current and past models are palpably inadequate to a global setting and will be of limited utility.

In the common law world, the general approach is a form of laissez-faire model that allows parallel proceedings to move to judgment, then treat the matter in terms of recognition and enforcement of the first judgment that issues.[15] Within this laissez-faire model, variations on the doctrine of *forum non conveniens* provide mechanisms that are applied either within the jurisdictional analysis or for declining jurisdiction that might exist. The *forum non conveniens* doctrine is not a fruitful candidate for a global regime regulating parallel proceedings (although it may provide some useful insight). While generations of case law have produced a *forum non conveniens* doctrine in the United States that is largely predictable and precise in fitting forum to circumstance, this predictability is the result of years of incremental case-building with apex courts at both the federal and state levels providing parameters and guidance.[16] Asking courts and legal systems globally to consider a list of perhaps a dozen factors in making a determination of better forum is unlikely to yield happy results in terms of intelligibility, transparency, or predictability. Furthermore, the complex balancing tests that *forum non conveniens* brings in its train are often not part of the armament or mind-set of judges in other legal systems[17] and it is unfair and unworkable to ask them to adopt an unfamiliar modus operandi to deal with a single class of cases.

The civil law world approach to regulating parallel proceedings by attempting to stipulate exclusionary jurisdictional rules *ab initio* is equally unpromising for a global convention. We have discussed elsewhere and above

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13 *Id.*

14 *See* CARBONNEAU ET AL., *supra* note 4, at 165 ("Few legal systems have enacted rules specifically regulating transborder litigation. Characteristically, legal systems adhere to an antiquated methodology of choice-of-law rules through which they designate a controlling substantive predicate by which to resolve disputes.").

15 *See* Herrup & Brand, *supra* note 1 (discussing parallel proceedings in the common law world).

16 *See* RONALD A. BRAND & SCOTT R. JABLONSKI, FORUM NON CONVENIENS: HISTORY, GLOBAL PRACTICE, AND FUTURE UNDER THE HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS, 37 (2007) ("In the United States, the doctrine of *forum non conveniens* has a long history, beginning with cases in the nineteenth century that allowed discretionary dismissal when the parties and the subject matter were unrelated to the forum, gaining direction in a seminal law review article in 1929, and finding definition in two U.S. Supreme Court decisions in 1947.").

17 *See id.* at 158 ("Ultimately, how one views the application of the doctrine of *forum non conveniens* to a case brought by a foreign plaintiff probably depends on one's perspective. The foreign plaintiff will tend to see any consideration of its nationality as discrimination, while the local defendant will tend to consider the plaintiff's foreign nationality as a factor indicating inconvenience in the forum seised and weighing in favor of litigation in an alternative forum.").

the reasons for the current and growing inadequacy of this approach, both in terms of an instrument on a global scale purporting to require or prohibit the exercise of direct jurisdiction, or the use of jurisdictional or quasi-jurisdictional factors as a gateway into the scope of a parallel proceedings instrument. Jurisdictional factors also fail as a test to determine the better forum for parallel proceedings within scope, for many of the same reasons. Simply put, there is no connection between a basis for the exercise of jurisdiction in a particular forum and whether that forum is a better forum than any other to dispose of litigation in an efficient fashion that is fair to all parties. Jurisdictional criteria for selection of a better forum will simply force litigation into Procrustean beds ill-suited to the particular cases. In addition, because of the multiplicity of jurisdictional bases and the likelihood that evolving global mobility will give rise either to different emphases in terms of the importance for any given country of a particular jurisdictional basis or to entirely new, reasonable bases, there will be (and should be) no global agreement on the priority of one jurisdictional basis over another. Metaphysical musings over the relative "quality" of jurisdictional bases are a scant foundation for a necessary global consensus on the subject. Each country makes and will continue to make its own determination in this regard.

Finally, as noted above, "first-in-time" rules have less to do with better forum than with the faster litigant, which often favors the party best able to hire for speed.

2. Proposing a "Cascade" Approach

In our view, a promising approach to designation of a better forum is to build from a small and manageable number of factors that are closely linked to the proper objectives of the instrument, namely the efficient and complete resolution of multiple related proceedings. In addition, a "cascade" approach might be useful: if the initial tranche of factors does not yield a resolution as to the better forum, a second tranche of factors may be considered to identify the better forum. If there is no resolution of the better forum question in the second round, it may be best simply to allow the proceedings to move in parallel. Once again, this is an effort at making the world a better place through a treaty. It is not the creation of perfect legislation for a single legal system. The goal must be workable as well as likely to gain a significant number of ratifications and accessions.

If the fundamental objectives of the convention are to reduce costs to litigants and achieve repose through complete resolution of related proceedings, the first tranche of better forum criteria should reflect these objectives. We propose three initial criteria for determining better forum:

1. Does one forum make it significantly more difficult or burdensome than others for one or more litigants to present their case under forum rules?

2. Is one forum more likely than others to provide a complete or significantly more complete resolution of the related disputes?
3. Are the proceedings in one forum at a significantly more advanced stage than in others?

Each of these criteria requires additional comment. The first criterion, difficulty or burden in presenting a case, combines considerations of fairness and efficiency and is restricted to the logistics in each legal system proceeding with adjudication of the particular cases in question. Its focus should be on such concrete problems as the relative ease or difficulty of necessary movement of witnesses and evidence, or access to physical locations for inspection. Estimates of relative cost are a fair component of this inquiry but they are speculative and should not be dispositive. Completely unacceptable are inquiries into the relative merits of features of procedural systems. There is no place in this criterion for normative judgments on matters such as the adequacy of disclosure regimes as opposed to the oppressiveness of discovery regimes, or the standards and burdens of proof, or the nature and type of remedies available in the other legal system.

The second criterion, likelihood of complete resolution of related claims, combines considerations of efficiency and repose. It is a disjunct with a qualitative and quantitative aspect: absolute repose may be a value to be sought through complete resolution of all related disputes but, if that is not possible, the forum that can provide a significantly more complete resolution should be favored.

The third criterion, stage of the proceedings, involves considerations of efficiency and fairness to litigants and should include considerations of whether designation of a forum in a less advanced stage of proceedings will require duplication of effort already expended or will otherwise prejudice one or more parties or interested persons.

Under this framework, each court presented with a parallel proceeding should make its own initial determination of the better forum based on these three criteria, although communication and cooperation with other courts should be encouraged. There will be two possible results.

a. Both courts agree that one is the better forum. The better forum proceeds with adjudication, subject to discussion below.
b. There is no agreement on better forum, either because each court determines that it is the better forum or because each determines that the other is the better forum.

If there is no agreement on the better forum, the courts move to a second tier and add other criteria for consideration, which will be additive to the results of the first level of inquiry:

4. Is there likely to be significantly greater delay or congestion in one forum as opposed to the other?
5. Is it significantly less fair to impose the public costs and burdens of resolution of all related disputes on the public of a particular country?

The fourth criterion combines efficiency and public interest considerations. It goes not to the logistical aspects of local procedural law, but to the factual situation in the local courts. When will justice be done, and with what burden as a matter of fact on each court involved? This combines considerations of public interest and fairness to the parties that come from efficiency of process. The fifth criterion is a public interest consideration and could conceivably include a consideration of the center of gravity of the related disputes. As with the procedure under the first tranche of criteria, communication and coordination of the courts involved should be encouraged.

If there is agreement on the better forum, that forum proceeds with adjudication. If there is no agreement, the convention provides no further rule regulating parallel proceedings and national law will control subsequent developments. There is nothing inherently wrong with two courts, or two legal systems, each having jurisdiction to decide the same case. The question is how to decide when it is best not to proceed in parallel but rather to consolidate time, expense, and effort in a single court. We acknowledge that there is a trade-off resulting from the use of limited and simple criteria for the designation of the better forum. Use of a limited number of simple better forum criteria may yield an instrument that is desirable and obtainable in terms of broad ratification but, at the same time, may limit the ability to perform delicate balancing and give up the comprehensiveness that the profusion of factors provides in a *forum non conveniens* analysis. As a policy choice, it may be better to tolerate a certain level of parallel proceedings rather than attempt to complicate further the better forum factors. As noted above, the balancing by courts of a multitude of factors may be a feature of particular legal systems and may work well within a single legal system but is not likely to work well in a multilateral convention that attempts to reach legal systems that do not employ this mechanism.

Finally, a point that merits discussion is whether there are situations in which parallel proceedings might continue despite the fact that the courts involved all determine that one is the better forum. Examples of such situations might be when a state is a party to litigation and that state's own courts are not the better forum, and cases that involve very strong public policy of the state whose courts are not the better forum. One or all of these situations might be an appropriate subject for declarations or other treatment.

IV. FINAL OBSERVATIONS

The ultimate justification for a parallel proceedings convention is that, by making transnational litigation more efficient, fair, and complete, it would contribute to a form of global good governance over and above the particular national political interests of the states involved. If the provisions of a proffered multilateral treaty do not make a significant contribution to global good governance, there should be no hesitation in rejecting the treaty. If the Hague Conference fails to produce a text in this area that makes a significant contribution to global good governance—and it might—other options such as select bilateral agreements with interested countries with which the U.S. has dense transboundary connections, or acceptance of the status quo pending future developments, might recommend themselves.